

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM E. GREEN,)
) No. CV-04-385-MWL
Plaintiff,)
) ORDER GRANTING PLAINTIFF'S
v.) MOTION FOR SUMMARY JUDGMENT
) AND REMANDING FOR FURTHER
JO ANNE B. BARNHART,) PROCEEDINGS
Commissioner of Social)
Security,)
)
Defendant.)
)

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on June 27, 2005. (Ct. Rec. 13,16.) Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** plaintiff's Motion for Summary Judgment (Ct. Rec. 13), **DENIES** defendant's Motion for Summary Judgment (Ct. Rec. 16), and **REMANDS** for further administrative proceedings.

Plaintiff applied for disability insurance benefits ("DIB")

1 and supplemental security income ("SSI") on March 8, 2000 alleging
2 an onset date of January 25, 1998 due to bipolar disorder. (Tr.
3 20;63.) After his claim was denied, plaintiff timely filed a
4 request for hearing. The Administrative Law Judge (hereinafter,
5 "ALJ,") Paul Gaughen held a hearing on June 11, 2002. (Tr. 265.)
6 In his August 20, 2002, decision, the ALJ denied benefits. (Tr.
7 16.) The Appeals Council denied review. The instant matter is
8 before this court pursuant to 42 U.S.C. §405(g).

9 ADMINISTRATIVE DECISION

10 The ALJ found that plaintiff had not engaged in substantial
11 gainful activity since the alleged onset date. (Tr. 31.) He found
12 that Mr. Green suffers from the severe impairments of bipolar
13 (depressive) disorder, anti-social personality disorder, and drug
14 and alcohol addiction in claimed remission. (Tr. 26.) The ALJ
15 found that the severity of plaintiff's impairments did not meet or
16 equal the requirements of the Listings. (Tr. 31.) He found that
17 Mr. Green has the residual functional capacity to perform work at
18 the medium exertion level, with environmental and social
19 restrictions. (Id.) The ALJ found that plaintiff is not able to
20 perform any of his past relevant work. (Id.) Relying on a
21 vocational expert, the ALJ found that plaintiff could perform
22 other work existing in significant numbers in the national
23 economy, such as a housekeeper, store laborer, and hand packager.
24 (Tr. 30.) The ALJ found plaintiff not disabled.

25 STANDARD OF REVIEW

26 The standard for review by this Court is set forth In *Edlund*
27 *v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

1 A district court's order upholding the
 2 Commissioner's denial of benefits is reviewed de novo.
Harman v. Apfel, 211 F.3d 1172, 1174 (9th Cir. 2000).
 3 The decision of the Commissioner may be reversed only if
 it is not supported by substantial evidence or if it is
 4 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 1097 (9th Cir. 1999). Substantial evidence is defined as
 5 being more than a mere scintilla, but less than a
 preponderance. *Id.* at 1098. Put another way, substantial
 6 evidence is such relevant evidence as a reasonable mind
 might accept as adequate to support a conclusion.
Richardson v. Perales, 402 U.S. 389, 401 (1971). If the
 7 evidence is susceptible to more than one rational
 interpretation, the court may not substitute its
 8 judgment for that of the Commissioner. *Tackett*, 180 F.3d
 at 1097; *Morgan v. Commissioner*, 169 F.3d 595, 599 (9th
 9 Cir. 1999).

10 The ALJ is responsible for determining credibility,
 resolving conflicts in medical testimony, and resolving
 11 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 Cir. 1995). The ALJ's determinations of law are
 12 reviewed de novo, although deference is owed to a
 reasonable construction of the applicable statutes.
McNatt v. Apfel, 201 F.3d 1084, 1087 (9th Cir. 2000).

13 SEQUENTIAL PROCESS

14 In the *Edlund* case, 253 F.3d at 1156-1157, the court set out
 15 the requirements necessary to establish disability:

16 Under the Social Security Act, individuals who are
 17 "under a disability" are eligible to receive benefits.
 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as
 18 "any medically determinable physical or mental
 impairment" which prevents one from engaging "in any
 19 substantial gainful activity" and is expected to result
 in death or last "for a continuous period of not less
 20 than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an
 impairment must result from "anatomical, physiological,
 21 or psychological abnormalities which are demonstrable by
 medically acceptable clinical and laboratory diagnostic
 22 techniques." 42 U.S.C. § 423(d)(3). The Act also
 provides that a claimant will be eligible for benefits
 23 only if his impairments "are of such severity that he is
 not only unable to do his previous work but cannot,
 24 considering his age, education and work experience,
 engage in any other kind of substantial gainful work
 25 which exists in the national economy...." 42 U.S.C. §
 423(d)(2)(A). Thus, the definition of disability
 26 consists of both medical and vocational components.

27 In evaluating whether a claimant suffers from a
 disability, an ALJ must apply a five-step sequential

1 inquiry addressing both components of the definition,
2 until a question is answered affirmatively or negatively
3 in such a way that an ultimate determination can be
4 made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
5 claimant bears the burden of proving that [s]he is
6 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
7 Cir. 1999). This requires the presentation of "complete
8 and detailed objective medical reports of h[is]
9 condition from licensed medical professionals." *Id.*
10 (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

11 When an impairment is severe but does not meet or equal the
12 requirements in the Listings of Impairments, the sequential
13 evaluation process must be employed to identify an individual's
14 functional limitations and restrictions and assess his or her
15 remaining capacities for work related activities. **SSR 96-8p.**

16 ISSUES

17 The general issue is whether there is substantial evidence to
18 support the ALJ's decision to deny benefits and, if so, whether
19 that decision was based on proper legal standards. The specific
20 issues raised by the parties are whether the ALJ properly credited
21 the medical opinions and whether he asked the vocational expert a
22 hypothetical that included all of plaintiff's impairments.

23 ADMINISTRATIVE HEARING

24 Plaintiff was 44 years old on the date of the hearing. (Tr.
25 279.) He completed high school and had worked as a carpenter,
26 backhoe operator, mill worker, logger and welder-pipefitter. (Tr.
27 279-82.) At the hearing, plaintiff testified that his back has
28 bothered him every day since an on-the-job injury in the spring of
1997. (Tr. 282-83.) He can sit for 30 minutes, stand for 20 to 30
minutes, and walk for one mile before needing to rest. (Tr. 283-
84.) He can lift and carry ten to fifteen pounds. (Tr. 284.) He
can climb stairs but only very slowly. (Tr. 285.)

ANALYSIS1. Weighing Medical Evidence

Plaintiff contends that the ALJ erred when he ignored the opinion of examining physician Clark Ashworth, Ph.D. (Ct. Rec. 14 at 13.) The Commissioner responds that the ALJ appropriately gave Dr. Ashworth's assessed limitations in November of 2001 little weight because the assessed poor functioning was described as occurring "during periods of disrupted mood," and the medical records reflect that plaintiff was doing well on his medications from August of 2000 through March of 2001, and from July of 2001 through February of 2002. (Ct. Rec. 17 at 8-9.)

Dr. Ashworth completed his assessment of the plaintiff on November 29, 2001. (Tr. 235.) After administering several tests, he diagnosed bipolar I disorder, most recent episode depressed, polysubstance dependence in partial remission by self report, and rule out personality disorder NOS with cluster B features. (Tr. 241.) Dr. Ashworth assessed a GAF of 45, indicating serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM -IV), at 32 (1995). (Id.)

Dr. Ashworth's prognosis was guarded. (Tr. 241.) He opined that plaintiff's ability to perform activities within a schedule, maintain regular attendance, and be punctual was poor. (Tr. 242.) He found that plaintiff's ability to sustain an ordinary routine without

1 special supervision, work with or near others without being distracted
2 by them, complete a normal workday or workweek, and perform at a
3 consistent pace was poor. (Id.) Dr. Ashworth opined that plaintiff's
4 ability to interact appropriately with the public, accept instructions
5 and respond appropriately to criticism from supervisors and to set
6 realistic goals or make plans independently of others was also poor.
7 (Tr. 243.) Dr. Ashworth described the medical and clinical findings
8 supporting his assessment as "mental status/history - during periods
9 of disrupted mood, unlikely to function well." (Tr. 242.)

10 In a disability proceeding, the treating physician's opinion is
11 to be given special weight because of his familiarity with his patient
12 and his patient's physical condition. See *Fair v. Bowen*, 885 F. 2d
13 597, 604-05 (9th Cir. 1989). The opinion of an examining physician
14 may be rejected for "specific, legitimate reasons" that are supported
15 by substantial evidence in the record. See *Andrews v. Shalala*, 53 F.
16 3d 1035, 1043 (9th Cir. 1995). An ALJ may not discredit the opinion of
17 an examining physician based solely on the opinion of a consulting
18 physician. *Lester v. Chater*, 81 F. 3d 821, 831 (9th Cir.
19 1990)(citation omitted). The opinion of a non-examining physician may
20 constitute substantial evidence if it is supported by and consistent
21 with other evidence. *Andrews*, 53 F. 3d at 1043; *Lester*, 81 F. 3d at
22 830-31. The ALJ is responsible for determining credibility, resolving
23 conflicts in medical testimony, and resolving ambiguities. *Edlund v.*
24 *Massanari*, 253 F. 3d 1151, 1156 (9th Cir. 2001).

25 Plaintiff's contention that the ALJ ignored Dr. Ashworth's
26 opinion is not supported by the ALJ's decision. The ALJ specifically
27 notes Dr. Ashworth's opinion that plaintiff's serious limitations
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1 occur *during periods of disrupted mood*. (Tr. 24; 242-43)(italics
2 added.) The ALJ compared this conditional opinion to the medical
3 records of plaintiff's treating physicians. (Tr. 25-26.)

4 On August 24, 2000, treating physician Avery Nelson, M.D., noted
5 that plaintiff is doing well. (Tr. 244.) After plaintiff complained
6 of sleepiness, Dr. Nelson reduced his dosage of depakote. (Id.) In
7 October of 2000, plaintiff reported he was less sleepy. Dr. Nelson
8 noted plaintiff was not symptomatic at this time. (Tr. 245.) The ALJ
9 observes that in December of 2000, Dr. Nelson reported that
10 plaintiff's condition is unchanged. He is doing well on his
11 medication. (Tr. 24, relying on Tr. 246.) On December 28, 2000, his
12 treatment providers indicated that plaintiff has moved to an
13 apartment, lives independently, and has maintained himself in the
14 community. (Tr. 247.) Plaintiff was again asymptomatic. (Id.) He was
15 diagnosed as having bipolar disorder in full remission. (Tr. 249.)

16 The ALJ notes that plaintiff was next seen on March 22, 2001.
17 (Tr. 25, relying on Tr. 251.) His counselor, Wes Minter, MSW, opined
18 that plaintiff is currently doing well. (Tr. 251.) In June of 2001,
19 Dr. Nelson noted that plaintiff's affect showed a normal range and
20 depth. His concentration was good. He was able to focus with no
21 difficulty and seemed comfortable during the interview. (Tr. 252.) The
22 ALJ points out that from July 31, 2001 through February 7, 2002,
23 plaintiff remained asymptomatic and continued to receive medication
24 review. His bipolar disorder remained in remission. (Tr. 25, relying
25 on Tr. 253-54; 255; 257-58.)

26 The opinion of an examining physician can be rejected for
27 specific and legitimate reasons supported by substantial evidence.

1 See *Andrews v. Shalala*, 53 F. 3d at 1043(9th Cir. 1995). Dr.
2 Ashworth's assessed limitations are described conditionally: during
3 periods of disrupted mood, plaintiff's functioning is poor. Even if
4 the ALJ fully credited Dr. Ashworth's opinion, it would not change the
5 fact that Dr. Ashworth merely described plaintiff's limitations when
6 he is experiencing disrupted moods.

7 The treatment records do not reveal disrupted moods. From March
8 of 2000 through February of 2002, plaintiff is described by his
9 treatment providers as doing well. (Tr. 152-53; 199-201; 244; 247;
10 250-58.) By December 28, 2000, plaintiff's bipolar disorder was in
11 full remission. (Tr. 249.)

12 Dr. Ashworth examined plaintiff on November 29, 2001. (Tr. 235.)
13 The ALJ gives greater credit to the treating physician's opinion that
14 plaintiff had no symptoms and his bipolar disorder was in full
15 remission both before and after Dr. Ashworth's assessment. This is a
16 specific and legitimate reason to discredit an examining physician's
17 opinion.

18 The ALJ also relied on the opinion of the testifying medical
19 expert, W. Scott Mabee, Ph.D., in discrediting Dr. Ashworth's
20 limitations. (Tr. 26.) Dr. Mabee testified that the results of the
21 MMPI administered by Dr. Ashworth are invalid because "there is such
22 an over-reporting of psychological symptoms." (Tr. 274.) Dr. Mabee
23 opined that Dr. Ashworth's assessed GAF of 45 is likely based on
24 subjective complaints. (Id.) Dr. Mabee opined that plaintiff's overall
25 testing and ability to function in the community suggest moderate, not
26 severe, limitations in functioning. (Tr. 275.) The ALJ appropriately
27 relied on the testimony of Dr. Mabee as additional substantial
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1 evidence in rejecting some of Dr. Ashworth's assessed limitations.

2 The ALJ also observed that plaintiff's own statements do not
3 support finding severe limitations in functioning such as those
4 assessed by Dr. Ashworth. The ALJ notes that plaintiff told Dr.
5 Ashworth that he is unable to work because of back pain, not because
6 of psychological problems. (Tr. 24; 235.) Plaintiff testified at the
7 hearing that he stopped working in May or June of 1997 after hurting
8 his back. (Tr. 282.) With respect to psychological impairments,
9 plaintiff testified:

10 "I'm not so antisocial that I can't be around people. It's just
11 that sometimes when I'm working or something and somebody bothers me
12 I just get a little irate and maybe go a little farther than I
13 should."

14 (Tr. 304.) Plaintiff's own statements contradict the level of
15 impairment assessed by Dr. Ashworth. The ALJ appropriately relied on
16 this evidence as well when he weighed Dr. Ashworth's opinion.

17 The ALJ rejected some of Dr. Ashworth's limitations for specific
18 and legitimate reasons supported by substantial evidence. The ALJ
19 appropriately weighed Dr. Ashworth's opinion.

20 2. ALJ's Hypothetical

21 Plaintiff contends that the ALJ failed to include all of his
22 assessed mental limitations in the hypothetical posed to the
23 vocational expert, ("VE"). (Ct. Rec. 14 at 11.) Specifically,
24 plaintiff contends that while the ALJ stated he was adopting the
25 mental limitations set forth by the testifying medical expert, W.
26 Scott Mabee, Ph.D., his hypothetical failed to include all of the
27 impairments listed by Dr. Mabee. (Ct. Rec. 14 at 11-13.) The

1 Commissioner responds that the ALJ's hypothetical "properly accounted
2 for all of Plaintiff's physical and mental limitations that the ALJ
3 found credible." (Ct. Rec. 17 at 11.)

4 At step five, the Commissioner bears the burden of showing that
5 a plaintiff can perform some other work that exists in "significant
6 numbers" in the national economy, taking into consideration the
7 plaintiff's education, age, work experience, and his residual
8 functional capacity. 20 CFR §§ 220.131(e), 404.1520(f),
9 404.1560(b)(3). To establish that there are jobs in "significant
10 numbers" in the national economy that a claimant can perform, the ALJ
11 may call a vocational expert to testify. At the hearing, the ALJ
12 should pose hypothetical questions to the vocational expert that "set
13 out all of the claimant's impairments." *Gamer v. Secretary of Health*
14 *and Human Servs.*, 815 F. 2d 1275, 1279 (9th Cir. 1987). The ALJ's
15 depiction of the claimant's impairments must be "accurate, detailed
16 and supported by the medical record." *Tackett v. Apfel*, 180 F. 3d
17 1094, 1101 (9th Cir. 1999).

18 The hypothetical questions that the ALJ posed to the VE did not
19 set out all of the impairments that the ALJ found. The ALJ notes that
20 Dr. Mabee, the testifying medical expert, set forth two areas of
21 marked limitation: in the ability to maintain social functioning, and,
22 more specifically, in the ability to accept instructions and respond
23 appropriately to criticism from supervisors. (Tr. 26.) The ALJ notes
24 that he finds this testimony "consistent with the medical evidence of
25 record." (Id.) The ALJ finds that plaintiff has "marked difficulties
26 in maintaining social functioning." (Tr. 26-27.) In assessing
27 plaintiff's residual functional capacity, ("RFC") however, the ALJ

1 states that "from time to time he [plaintiff] may have difficulties
2 accepting instructions and criticism from the supervisor; and will
3 likely have difficulty in jobs requiring frequent collaboration with
4 others." (Tr. 29.)

5 In the ALJ's hypothetical question to the vocational expert, he
6 stated:

7 "From time to time he may have difficulties in accepting
8 instruction and criticism from his supervisor. . . There's some
9 obstinance and reluctance about accepting the instructions from time
10 to time. As part of this, he'll have difficulty in jobs requiring
11 frequent collaboration with others or frequent interaction with the
12 supervisor. . . worker would have difficulty handling jobs also which
13 would require frequent public contacts."

14 (Tr. 309-310.)

15 The problem with this, as plaintiff points out, is that while
16 the ALJ specifically found that Dr. Mabee testified that plaintiff's
17 difficulties in maintaining social functioning are "marked", and based
18 on this assessment, the ALJ *found* that this is a marked impairment,
19 his hypothetical described the limitation as causing difficulties
20 "from time to time." (Tr. 26, 29, 310.) A marked impairment is defined
21 as one causing a "very significant interference with work-related
22 activities." (Tr. 231.) This contradicts the ALJ's hypothetical where
23 the impairment was sporadic and occurred only "from time to time."
24 Because the ALJ's hypothetical is inconsistent with his stated
25 findings, remand is necessary. *See Jones v. Heckler*, 760 F. 2d 993,
26 998 (9th Cir. 1985) ("To qualify as substantial evidence, the
27 testimony of a vocational expert must be reliable in light of the

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1 medical evidence.")

2 Conclusion

3 Having reviewed the record and the ALJ's conclusions, this court
4 finds that the ALJ's decision is in part supported by substantial
5 evidence in the record but is not free of legal error. Because the
6 ALJ's findings are inconsistent with his hypothetical to the
7 vocational expert, remand is necessary.

8 Accordingly,

9 **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 13)
11 is **GRANTED**, and the case is remanded for further administrative
12 proceedings.

13 2. Defendant's Motion for Summary Judgment (Ct. Rec. 16)
14 is **DENIED**.

15 3. Any application for attorney fees may be filed by
16 separate Motion.

17 4. The District Court Executive is directed to file this
18 Order and provide a copy to counsel for Plaintiff and Defendant.
19 Judgment shall be entered for Plaintiff and the file **CLOSED**.

20 **DATED** this 26th day of July, 2005.

21 s/ Michael W. Leavitt

22 MICHAEL W. LEAVITT
23 UNITED STATES MAGISTRATE JUDGE
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